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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1989

PAULA MEIER, et al.,
*Petitioners,*

vs.

NISSAN MOTOR CORPORATION
IN U.S.A., et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

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## QUESTIONS PRESENTED

1. Whether Federal Motor Vehicle Safety Standard 208, which requires an automobile manufacturer to install occupant restraint systems in all automobiles manufactured or sold in the United States, preempts or otherwise bars petitioners from asserting respondents' failure to install airbags in its automobiles as evidence of a design defect in a state court common law products liability suit.

2. Whether the California Court of Appeal exceeded its jurisdiction by granting respondents' petition for a writ of mandate, which respondents did not file until forty-five (45) days after the expiration of the time limit for such relief, as provided by California Code of Civil Procedure § 437c(1).

## PARTIES

Petitioners herein are Paula Meier, individually, as guardian ad litem for Shannon Ann Meier and Kristen Jeanne Meier, and on behalf of the Estate of James R. Meier, deceased. Respondents are Nissan Motor Corporation in U.S.A., Nissan Motor Company, Ltd. and Oxnard Nissan. In the lower court's opinion, the Nissan parties were petitioners, the Superior Court of the State of California for the County of Los Angeles was the respondent and the Meier parties were real parties in interest.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

## OPINION BELOW AND RELATED CASES

The opinion of the California Court of Appeal is reported at 212 Cal.App.3d 980, 261 Cal.Rptr. 80, and is reprinted in the Appendix hereto, *infra,* p. 1a.

Two related cases, *Wood v. General Motors Corporation,* 865 F.2d 395 (1st Cir. 1988) and *Kitts v. General Motors Corporation,* 875 F.2d 787 (10th Cir. 1989) are pending before this Court on petitions for writs of certiorari. The *Wood* case is related to this action because it involves identical issues of law and because it was the principal authority for the California Court of Appeal's decision

which this Court is asked to review in this petition. The *Kitts* case also involves identical issues of law and was based upon the First Circuit Court of Appeals' decision in *Wood*.

## JURISDICTION

The opinion of the California Court of Appeal was decided on May 26, 1989 and modified on June 22, 1989. (See Appendix A) Petitioners herein sought review by the California Supreme Court which declined to review the matter on August 31, 1989. A copy of the California Supreme Court's decision appears in the Appendix hereto at pp. 7a-10a *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## STATUTES AND REGULATIONS

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, P.L. 89-563, 80 Stat. 718 ("Safety Act") provides in pertinent part as follows:

> § 1392(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such

> requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.
>
> ***
>
> § 1397(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Relevant excerpts from Federal Motor Vehicle Safety Standard 208, 49 CFR § 571.208 are contained in petitioners' Appendix hereto at pp. 5a-6a. As the subject Nissan Stanza was manufactured in 1982, its occupant restraint system is governed by the provisions of Safety Standard 208, commencing at 49 CFR 571.208.S4.1.2.

California Code of Civil Procedure § 437c(l) provides as follows:

> A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section except entry of summary judgment, a party may, within 10 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding 20 days as the trial court may for good cause allow, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States.

## STATEMENT OF CASE

On June 4, 1986, petitioners filed a wrongful death action in the West District of the Superior Court of the State of California for the County of Los Angeles. The complaint alleges, *inter alia,* that the 1982 Nissan Stanza automobile driven by decedent James R. Meier was defective in design. Petitioners contended subsequent to the filing of the complaint that the Nissan Stanza was defectively designed because the occupant restraint system installed in the automobile, a three-point safety belt, failed to restrain the decedent and because air bags had not been installed in the automobile.

On December 2, 1988, respondents herein filed a motion for summary adjudication of issues pursuant to California Code of Civil Procedure § 437c, asserting that petitioners' theory of liability, predicated upon respondents' failure to install air bags in the subject Nissan Stanza was preempted by Federal Motor Vehicle Safety Standard 208, which permits an automobile manufacturer to use one of three types of occupant restraint systems of which one is air bags. Petitioners admitted that respondents complied with the federal safety standard but asserted that 15 U.S.C. § 1397(c) permitted them to proceed with their common law cause of action, predicated in part upon the "no air bag" theory of liability.

On January 23, 1989, the court served notice of its decision to deny the motion for summary adjudication of issues in which the court states:

> "Motion denied. After reading moving, responsive and reply papers, the court concludes that the Federal Statute does not pre-empt common law remedies. Although the issue is not altogether free from

doubt, the court cannot conclude as a matter of law that the motion should be granted."

On March 24, 1989, forty-five (45) days after notice of entry of the summary adjudication order, respondents filed a petition for a writ of mandate in the Court of Appeal of the State of California, Second Appellate District. Notwithstanding the fact that California Code of Civil Procedure § 437c(l) requires such a petition to be made, if at all, within ten days after notice of entry of the order is given, the Court of Appeal granted the petition over petitioner's objection and issued a peremptory writ in the first instance directing the trial court to grant respondents' motion for summary adjudication of issues. In its original unpublished opinion filed on May 26, 1989, the court held that 15 U.S.C. § 1392(d) precluded, by way of implied federal preemption, a common law tort action based upon a manufacturer's failure to install air bags in its automobiles. The court based its decision upon *Wood v. General Motors Corp.* 865 F.2d 395 (1st Cir. 1988). Although the *Wood* case is the sole authority cited by the court in support of its decision, the court does not discuss the decision reached by the court in *Wood* nor does it explain why it was persuaded by the *Wood* decision.

On June 22, 1989, the Court of Appeal modified and certified its decision for publication. In the modified opinion, the California Court of Appeal addressed a California appellate decision, *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, 132 Cal.Rptr. 605, which held that common law claims are not preempted by federal law. The court went on to hold that it was not bound by either the *Wood* or *Buccery* decisions but that it was persuaded "that the 'no air bag' issue is preempted by federal law." (212 Cal.App.3d 982.)

On July 3, 1989, petitioners filed a petition for review in the California Supreme Court. The issues raised in the petition were that the Court of Appeal exceeded its jurisdiction by granting respondent's untimely petition and that the Court of Appeal erred in holding that petitioner's "no air bag" theory of liability was preempted by Federal law. The California Supreme Court, however, denied the petition for review on August 31, 1989, although Justice Stanley Mosk was of the opinion that the petition should be granted.

This petition ensued.

## REASONS FOR GRANTING THE WRIT

### I

### THE PETITION PRESENTS A FEDERAL QUESTION WITHIN THIS COURT'S CERTIORARI JURISDICTION

Certiorari jurisdiction is conferred upon this Court where a state court construes or applies federal law. (*Operating Engineers v. Jones* 460 U.S. 669, 675, 75 L.Ed 2d 368, 103 S.Ct. 1453 (1983) [Whether the National Labor Relations Act preempts State's common law cause of action for tortious interference with contract presents a federal question within the Supreme Court's certiorari jurisdiction].)

In this petition, petitioners request the court to review the holding of the California Court of Appeal that Federal Motor Vehicle Safety Standard 208 preempts a state common law cause of action for products liability predicated upon the manufacturer's failure to install air bags in its vehicles. In its decision, the California Court of Appeal construed two provisions of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1392(d) and

1397(c) and applied them to petitioners common law tort cause of action as a bar to same. (See the opinion of the California Court of Appeal below at 212 Cal.App.3d 980, 982, set forth in the Appendix, p. 3a.) Thus, this Court has the requisite jurisdiction to issue petitioners' requested writ of certiorari.

Petitioners also challenge the decision of the California Court of Appeal on the grounds that the court exceeded its jurisdiction conferred by California Code of Civil Procedure §437c(l). This Court possesses certiorari jurisdiction to hear claims that state courts have exceeded their own jurisdiction. (*McDonald v. Oregon Navigation Co.*, 233 U.S. 665, 670, 58 L.Ed. 1145, 34 S.Ct. 772 (1914) [A state court's " . . . fundamental absence of any and all right to take cognizance of the cause" presents a Federal issue subject to the Supreme Court's certiorari jurisdiction.])

## II

## *WOOD V. GENERAL MOTORS CORP.* 865 F.2d 395 (1st Cir. 1988), ON WHICH THE COURT BELOW EXCLUSIVELY RELIED, WAS INCORRECTLY DECIDED; COMPLIANCE WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS DOES NOT EXEMPT ANY PERSON FROM LIABILITY UNDER THE COMMON LAW

It is hornbook law that preemption is a matter of congressional intent. (Nowak, Rotunda and Young, *Constitutional Law* (West 2d ed. 1983), p. 295.) *Wood v. General Motors Corp., supra,* 865 F.2d 395, 401 itself so holds. Yet *Wood* concludes that actions such as the one at bar were entirely unforeseen when the Safety Act was enacted. (865 F.2d 395, 404-406.) The proposition that Congress could have *intended* to preempt state common

law actions which did not exist when the Safety Act was enacted and which were in 1966 entirely unforeseen is starkly illogical. *Wood* does not explain how Congress could have intended to preempt actions such as this when:

> "We conclude that it is unrealistic to ascribe to the authors of the Safety Act, and to Congress generally, an awareness that in the years ahead a new breed of state tort actions would be developed from which design standards might emerge that, on some rare occasion, might create a direct conflict with a particular FMVSS. Thus when Congress inserted the savings clause, it did not contemplate that lawsuits would be brought with the potential to give rise to the current dilemma." (*Wood v. General Motors Corp., supra* 865 F.2d 395, 406.)

The contradiction between the conclusion that Congress intended to preempt state actions of this kind and the finding that it could not have and did not foresee such actions in 1966 when the Safety Act was enacted is patent. Congress could not have intended to nullify that which it did not know would ever exist. Yet the finding that Congress could not have foreseen in 1966 state tort actions for defective design is no casual comment in *Wood* but the product of extended analysis. (*Wood v. General Motors Corp., supra* 865 F.2d 395, 404-406.) Petitioners submit that this studied and inherent contradiction in *Wood* is reason enough to decline to follow it as unpersuasive.

Further, *Wood* is not persuasive because it dispenses with the savings clause which petitioners contend was intended by Congress to apply to cases such as the one at bar. The savings clause provides:

> "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." (15 U.S.C. § 1397(c).)

After citing the provisions of 15 U.S.C. 1392(d) and the savings clause, the *Wood* court noted the conclusion of the District Court that since Congress had been fully aware of the fact that damage suits would be initiated against parties who had complied with federal regulations, Congress had recognized and sanctioned the "tension" between compliance with federal regulations and state common law claims. (865 F.2d 395, 403.) The *Wood* court then concluded:

> "We agree with neither General Motor's reading of Congress's express intent nor with that of Wood and the district court. We instead reach a third conclusion: Congress in 1966 did not contemplate the likelihood that there would be a state tort action that would effectively create a state design standard conflicting with a federal safety standard. As it did not envisage this peculiar type of lawsuit, and as no reason appears in the legislative history or comes to mind as to why Congress would have meant to endorse a state claim having the same effect as a forbidden state regulation, we do not find that Congress meant to sanction the 'tension' between the FMVSS and state common law existing in the current situation. [ ] This interpretation of the Safety Act and of Congress's intent is first suggested by the very fact that the two provisions, read alone, yield

> such different results. If Congress had considered the instant type of tort claim in these facts, it would scarcely have left unexplained such a glaring ambiguity. Our reading is supported by the state of tort law when the Safety Act was passed in 1966 and the legislative history of the Act." (footnote omitted) (*Wood,* 895 F.2d at 403-404.)

The answer to the foregoing is that 23 years have passed since 1966 which have brought the changes in state tort actions described in *Wood* and yet Congress has allowed the savings clause to stand as enacted in 1966. As the past 23 years show, Congress has decided to tolerate the "tension" between section 1392(d) and the savings clause. This Court (and the courts below) should do no less.

No court has the power to arrogate to itself the right to make legislative policy contrary to that expressed by the Congress, nor should a Court draft a social policy which the Congress has consistently rejected since 1966. Yet this is what the *Wood* decision and the California Court of Appeal in the *Nissan* case have done. Petitioners submit these decisions should be set aside.

## III

## THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS OF THE CALIFORNIA COURT OF APPEAL, COURTS OF LAST RESORT IN OTHER STATES, AND DECISIONS OF THE U.S. CIRCUIT COURTS OF APPEAL

Prior to the appellate decision in *Wood v. General Motors Corp.* 865 F.2d 395 (1st Cir. 1988), decided on December 28, 1988, eight Federal Circuit Courts and five state courts of last resort had addressed the issue of

whether compliance with the federal motor vehicle Safety Standards exempts automobile manufacturers from common law liability in products liability actions predicated upon design defects.

Some of these cases, like the *Wood* and *Kitts* cases and the case at bar, viewed the issue as whether federal safety standards preempt, either expressly or impliedly, common law claims for design defects.

Other cases, petitioners contend, addressed the issue more realistically. Those cases framed the issue as whether compliance with the Federal Safety Standards conferred immunity upon automobile manufacturers for common law liability arising out of design defects. In those cases, the automobile manufacturers asserted that compliance with the Federal Safety Standards created an absolute bar to common law liability for design defects because, as a matter of law, a finding of compliance with the Federal Safety Standards was the equivalent of a finding that no design defect existed. (e.g. *Knippen v. Ford Motor Company,* 546 F.2d 993, 1000 (D.C. Cir. 1976); *Dawson v. Chrysler Corporation,* 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied,* 450 U.S. 959 (1981).)

Both lines of cases, however, had one thing in common, they all rejected any attempt by the automobile manufacturer to escape liability for common law design defects merely by complying with the minimum requirements established by the Federal Safety Standards.

Thus, in the first such case to reach a federal court of appeal, *Larsen v. General Motors Corporation,* 391 F.2d 495, 506 (8th Cir. 1968) the Eighth Circuit stated:

> Section 108(c) of the Act, 15 U.S.C. § 1397(c), expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves

> the common law liability intact . . . It is apparent that *the National Traffic Safety Act is intended to be supplementary of and in addition to the common law* of negligence and product liability. [Emphasis added.]

This was the undisputed rule in California as well. In *Buccery v. General Motors Corp., supra,* the California Court of Appeal held that:

> "Defendants' *compliance* with Federal Motor Vehicle Safety Standards *does not preclude* imposition of common law liability for a defective product." (60 Cal.App.3d at 540.) [Emphasis added.]

The court went on to explain the common law duty of an automobile manufacturer, which parallels the goals and duties imposed by the Federal Safety Act, by stating:

> "The manufacturer must evaluate the crashworthiness of his product and take steps as may be reasonable and practicable to forestall particular crash injuries and mitigate the seriousness of others." (60 Cal.App.3d at 546.)

The significance of this common law rule is that it does not require an automobile manufacturer to undertake design changes at the caprice of a judge or jury. If the design defect claimed by petitioners, i.e., no air bags, could not be cured within reason and practicability, then no liability exists. (See section V.B., *infra.*) However, the *Buccery* court wisely held that an automobile manufacturer can be held liable for a design defect which was both reasonable and practicable to cure but which the automobile manufacturer failed or chose not to cure. Other jurisdictions follow this same principle. E.g., *Voss v. Black & Decker Manufacturing* 59 NY 2d 102, 109, 463 N.Y.S. 2d 398, 450 N.E. 2d 204, 208 (1983); *Huff v. White Motor Corp.* 565 F.2d 104 (7th Cir. 1977), appeal after remand

609 F.2d 286 [applying Indiana law]; *Seege v. Volkswagenwerk A.G.,* 648 F.2d 833 (2d Cir. 1981), *cert. denied* 454 U.S. 867, 70 L.Ed.2d 168, 102 S.Ct. 330 [applying North Carolina law.]

Until the *Wood* case was decided, no federal appellate court or California court had barred a plaintiff from asserting a common law cause of action based upon a design defect despite the automobile manufacturer's compliance with Federal Safety Standards. However, subsequent to *Wood,* the court below in this action and two other Federal Courts of Appeal have followed the principle established in *Wood.* See *Kitt v. General Motors Corp.* 875 F.2d 787 (10th Cir. 1989) and *Taylor v. General Motors Corp.* 875 F.2d 816 (11th Cir. 1989).

As a result of these various rulings, there is now a substantial conflict between the decision of the court below and decisions of other federal circuits, California courts and other state courts of last resort over whether Congress intended to preempt any common law design defect cases. Even for those courts finding premption, there is a sharp disagreement over the theory under which section 1397(c) is, in effect, nullified. There are currently thousands of automobile design defect cases pending throughout the country, over a hundred of which involve claims concerning passive restraints. The preemption issue has been raised or is lurking in every one of them and, therefore, this Court should grant review to resolve the conflict.

## IV

## THE DECISION BELOW, WHICH STRIPS PETITIONERS OF THEIR COMMON LAW THEORY OF LIABILITY FOR DESIGN DEFECT BASED UPON RESPONDENTS' FAILURE TO INSTALL AIR BAGS IN THEIR AUTOMOBILES, IS A CRITICAL ISSUE TO CONSUMERS AND THE PUBLIC IN GENERAL

### A. The Policy Underlying The Safety Act.

The Safety Act was enacted in 1966. Its very first provision states:

> § 1381. Congressional declaration of purpose. Congress hereby declares that the purpose of this Act is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register. (Sept. 9, 1966, P. L. 89-563, § 1, 80 Stat. 718.)

This provision has remained unaltered since its enactment in 1966. It is thus necessary for courts to interpret the Safety Act, including any immunity or preemptive effect contained therein, in light of this stated purpose. Moreover, any policy underlying a particular provision of the Safety Act, such as the policy of promoting uniformity of regulations which underlies § 1392(d), must be given some effect but its application may not supercede the purpose of the Safety Act as a whole.

Consistent with the overall purpose of the Safety Act, Congress enacted § 1397(c), which permits common law tort claims to be asserted against automobile manufactur-

ers notwithstanding their compliance with Federal Safety Standards. *Larsen v. General Motors Corp., supra*, at 391 F.2d 506.

The stated purpose of said provision is contained in the House Committee Report, as follows:

> *Common Law Liability* — Sesction 108(c) of the reported bill [15 USC § 1397(c)] provides that compliance with any Federal Motor Vehicle Safety Standard does not exempt a person from any liability under common law.
>
> It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law, particularly those relating to warranty, contract, and tort liability. (H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24 (1966).)

The Senate Report, which has been read by automobile manufacturers to be more equivocal than the House Report on this issue, was unfortunately prepared prior to the time that 15 U.S.C. § 1397(c) was added to the Safety Act by the House of Representatives. 15 U.S.C. § 1397(c) was, of course, approved by the Senate, however, without further report or comment.

The decision below, which held that petitioners' common law theory of liability was preempted by Federal Safety Standard 208, is thus in direct conflict with 15 U.S.C. § 1397(c) as Congress intended that provision to be applied. The decision below effectively holds that compliance with Federal Safety Standard 208 is an absolute defense to a common law "no air bag" claim or at least constitutes an absolute bar to such a claim.

## B. The Decision of the Court Below Contravenes the Purpose Underlying the Safety Act.

Generally, the "preemption doctrine" is applied in situations where a federal regulatory scheme is substituted for those of individual states. Likewise, the federal regulatory scheme generally contains its own rights and remedies. (*Silkwood v. Kerr McGee Corp.* 464 U.S. 238, 251, 78 L.Ed.2d 443, 104 S.Ct. 615 (1989). "Preemption", as used by the California Court of Appeal in this instance, is a misnomer because the Safety Act provides no rights or remedies to automobile purchasers, only to automobile distributors and dealers. See 15 U.S.C. § 1400. Further, the Safety Act only contains a provision establishing a federal claim for damages where the automobile manufacturer has not complied with the Federal Safety Standards.

Congress, however, did not intend compliance to be a defense to a common law action. (*Larson, supra* 391 F.2d at 506.) Therefore, as *Larson* held, Congress intended common law claims to be asserted in the face of the manufacturer's compliance with applicable safety standards. Thus, the decision of the court below, while purporting to meet the criteria for implied preemption in reality established an absolute federal bar or defense to common law "no air bag" claims which is totally contrary to Congress' avowed purpose for 15 U.S.C. § 1397(c).[1]

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[1]Generally, a manufacturer's compliance with law is some evidence that the manufacturer was not negligent but it is by no means an absolute defense. See *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 157 ["I]t is general law that custom is admissible against which a finder of fact may measure a standard of care . . . safety codes promulgated by an industry or trade or like regulations have similarly been admitted."]

While the court below and the court in *Wood* justify their decisions based upon their belief regarding Congress' purported intent to preempt "no air bag" claims, both courts seem to have based their decision substantially on a policy ground which is never mentioned in the Safety Act and in fact conflicts with the expressed purpose of the Safety Act — avoiding a multiplicity of actions, or, in other words, if common law "no air bag" claims are allowed to be asserted, it will spawn a flood of lawsuits on the airbag issue. The court below states:

> "To hold otherwise would be to allow a potential flood of actions against manufacturers that have been following the custom of the industry and acting in compliance with Federal regulations. The result would not only work a hardship to manufacturers, but also might so encourage litigation as to hamper the administration of justice." (212 Cal.App.3d 980, 982-983.)

In *Wood,* the court stated:

> "... With respect to a claim that a vehicle is defective because it lacks air bags, however, it seems obvious that a damages award will have a pronounced effect on the manufacturer's future conduct. The same theory of recovery could be pursued by every front seat occupant injured in a multipurpose vehicle. It is well known that injuries to front seat occupants are frequent; well over 20 lawsuits have been filed on the theory of absence of air bags in the last two years." (865 F.2d at 410.)

These two decisions say that if "no air bag" claims are not barred, the number of such claims "may" or "might" or "could" be too great for the court system to handle. While the orderly and speedy administration of justice is

indeed a worthy goal, courts may not substitute this goal for the goal of the Safety Act, i.e., to reduce the number of deaths and injuries arising out of traffic accidents. Such policy decision must be left to Congress which has the capacity and resources to determine whether policies affecting tort reform and the administration of justice should be implemented and their effects on the policy underlying the Safety Act.

Therefore, this petition should be granted, if for no other reason, so that the decision to allow tort victims like petitioners herein to go uncompensated for their loss for the sake of economic efficiency is left to the legislative branch for determination.

## V

## THE DECISION BELOW, WHICH HOLDS THAT PETITIONERS' COMMON LAW CAUSE OF ACTION FOR PRODUCTS LIABILITY PREDICATED UPON RESPONDENTS' FAILURE TO INSTALL AIRBAGS IN THEIR AUTOMOBILES IS PREEMPTED BY FEDERAL LAW, VIOLATES THE EXPRESS PROVISIONS OF 15 U.S.C. § 1397(c) AND MISCONSTRUES THE PROVISIONS OF 15 U.S.C. § 1392(d)

### A. The Court Below Misconstrued The Term "Motor Vehicle Safety Standard."

The Court below, following the reasoning in *Wood,* held that petitioners' "no air bag" claim was impliedly preempted by Federal Safety Standard 208 because a jury verdict in a common law action is "tanamount" to a state standard. According to the court in *Wood,* any jury verdict which has an effect upon how the defendant will conduct himself in the future constitutes a state regulation or standard. (865 F.2d at 410-411.)

The determination that a jury verdict is the functional equivalent of a state regulation, however, is a gross misconstruction of the Safety Act which renders the Safety Act ambiguous, whereas a narrow construction of the Safety Act, applied by the district court in *Wood*, would avoid any ambiguity and would further promote the purpose underlying the Safety Act. (See 673 F.Supp. 1108, 1115.)

Rules of statutory interpretation require a court to give meaning, if possible, to every provision of the statute and to avoid an interpretation which renders the statute ambiguous or nonsensical. *Woodfork v. Marine Cooks and Stewards Union* 642 F.2d 966, 970-971 (5th Cir. 1981); *Sode v. U.S.* 531 F.2d 531, 538, 209 Ct.Cl. 180 (1976).

The term "Motor Vehicle Safety Standard," as used in 15 U.S.C. § 1392(d) is defined in 15 U.S.C. § 1391(2), which provides:

> "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

A "standard" is defined as "anything recognized as correct by common consent, by approved custom, or by those most competent to decide; a model; a type; a pattern; a criterion." *Webster's New Twentieth Century Dictionary of the English Language, Unabridged* (2d ed. 1978) page 1772.

These definitions simply do not embrace common law decisions or jury verdicts. One thing should be clear from the above definitions — an essential element of a standard is that it is uniform and consistent in its application.

## B. Products Liability Decisions Do Not Constitute Safety Standards.

Under common law, a design defect is determined in the context of all of the facts of a given case. Therefore, jury verdicts may well be inconsistent in determining whether a failure to install air bags constitutes a design defect in a particular case.

While in this case petitioners contend that a jury would find that respondents' failure to install air bags caused James Meier's death when his seatbelt failed to adequately restrain him, other juries might find under other facts that in a given action the failure to install air bags was not a design defect because the air bags would have produced no added safety, as in non-frontend collisions, or that a plaintiff's negligent conduct would have precluded any extra safety benefit afforded by the air bags, such as driving with the door open, not sitting properly in the seat or reclining too far back in the driver's seat.

Moreover, as the existence of a design defect is a question of fact under California law, as well as other states, Courts of Appeal are forbidden from creating a common law rule which requires all automobile manufacturers to install air bags. While in some cases, a jury may determine according to the facts of the particular case that the manufacturer's failure to install air bags constitutes a design defect, it is not nearly as clear as the *Wood* court suggests that once one jury has decided that the failure to install air bags constitutes a design defect that all automobile manufacturers will be forced "like one coming up for air after being underwater," to modify the design of all multipurpose vehicles to include air bags. (See 865 F.2d 410-411.)

Interpretation of the term "motor vehicle safety standards" to include jury verdicts creates an ambiguity between the provisions of 15 U.S.C. § 1392(d), and 15 U.S.C. § 1397(c). According to 15 U.S.C. 1392(d), if a jury verdict in a common law "no air bag" tort action constitutes a safety standard, then the common law action must be barred or at least its verdict must be consistent with Federal Safety Standard 208. However, this result directly contradicts the provision of 15 U.S.C. § 1397(c), expressly permitting common law actions to proceed without being affected by the Safety Act.

However, this ambiguity could have been totally avoided had the court construed "motor vehicle safety standards" to mean only regulations enacted by a state or other government entity. According to this interpretation, government regulation is constrained by 15 U.S.C. § 1392(d) while jury verdicts in common law actions are controlled by 15 U.S.C. § 1397(c). This interpretation gives meaning to both provisions of the Safety Act without creating any ambiguity or without sacrificing the underlying goal of the Safety Act, i.e., the prevention of traffic accident deaths and injuries.

As Congress did not see fit to include in its definition of "Motor Vehicle Safety Standards" any reference to common law decisions or jury verdicts, the interpretation given by the Court below and the court in *Wood* is either erroneous or an act of judicial legislation.

The error in the court's reasoning is that it fails to make a distinction between government regulation and economic forces which exist in the marketplace. A safety standard may be created by government regulation. Such a standard would apply to all automobile manufacturers and to all automobiles. A manufacturer cannot, in the face

of government regulation, refuse to comply with its provisions.

On the other hand, a safety standard is not established when the manufacturer still possesses a choice of whether to adopt the standard or risk the imposition of liability based on a state's common law and a jury's determination. A manufacturer is not free to disobey a regulation but it is free to admit or deny liability on the facts of each case as, and where, they arise. That these decisions are influenced by economic considerations is not the same as subjecting the manufacturer to government regulation.

## VI

## THE CALIFORNIA COURT OF APPEAL EXCEEDED ITS JURISDICTION CONFERRED BY CALIFORNIA CODE OF CIVIL PROCEDURE § 437c(l)

On January 23, 1989, the trial court in this action in denying respondents' Motion for Summary Adjudication of Issues, held that petitioners' "no air bag" claim was not preempted by federal law. On the same date, the court mailed copies of its minute order, which reflects the entry of the order, to all counsel in this action. According to California law, the court's mailing of a minute order to the parties commences the running of the time period for seeking a writ imposed by section 437c(l). (*Sturm, Ruger & Co. v. Superior Court* 164 Cal.App.3d 579, 582, 210 Cal.Rptr. 573 (1985).)

Respondents herein did not file their petition for a writ until March 24, 1989, forty-five (45) days after the time for seeking a writ elapsed. However, it was not within the Court of Appeal's discretion to grant the untimely application for a writ because the timely filing of an application for a writ pursuant to section 437(c)(l) is

jurisdictional. *Abadjian v. Superior Court* 168 Cal.App.3d 363, 369, 214 Cal.Rptr. 234 (1985), approving *Sturm, Ruger & Co. v. Superior Court, supra.* In *Sturm* the court states:

> "As a general rule, in the absence of a specific statutory provision an appellate court may consider a petition for extraordinary writ at *any* time, subject to its discretionary power to deny relief on the grounds of laches. The manifest purpose of the 1983 amendment to Section 437c was to change this rule with regard to orders relating to motions for summary judgment — [in order] to prevent the losing party from causing delays in trial court proceedings by use of dilatory petitions to the appellate court." *Id.* at 581. [citations omitted.]

Therefore, the untimely petition of respondents herein to the California Court of Appeal should have been summarily dismissed and its decision, in the absence of jurisdiction, is void. (*Valley v. Northern Fire & Marine Ins. Co.* 254 U.S. 348, 353-354, 65 L.Ed. 297, 41 S.Ct. 116 (1920); *Standard Pipe & Supply Co. v. Superior Court* 9 Cal.App.2d 769, 51 P.2d 910.)

## CONCLUSION

For all of the reasons stated hereinabove, petitioners respectfully request this court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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NOT TO BE PUBLISHED
COURT OF APPEAL — SECOND DIST.
FILED
MAY 26, 1989
ROBERT N. WILSON....Clerk

.....
Deputy Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

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SECOND APPELLATE DISTRICT

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DIVISION ONE

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NISSAN MOTOR CORPORATION IN U.S.A., et al.,
*Petitioners,*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
*Respondent,*

PAULA MEIER, etc., et al.,
*Real Parties in Interest.*

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B040894
(L.A.S.C. No. WEC 103437)
(LAWRENCE WADDINGTON, Judge)

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**OPINION AND ORDER GRANTING PEREMPTORY WRIT OF MANDATE**

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The Court:*

The petition for writ of mandate, filed March 24, 1989, and the opposition thereto, filed May 23, 1989, have been read and considered.

As there is not a plain, speedy and adequate remedy at law, and in view of the fact that the issuance of an alternative writ would add nothing to the presentation already made, we deem this to be a proper case for the issuance of a peremptory writ of mandate

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*SPENCER, P.J. HANSON (Thaxton), J. ORTEGA, J.

"in the first instance." (Code Civ. Proc., § 1088.) Opposition was requested by letter, and the parties were notified by the same letter, dated May 11, 1989, as to the court's intention to issue a peremptory writ. (*Palma* v. *U.S. Industrial Fasteners* (1984) 36 Cal.3d 171, 180.)

Petitioners, an automobile manufacturer and other defendants in an underlying wrongful death action, seek review of an order of respondent court (Hon. Lawrence Waddington), denying their motion for summary adjudication of the issue that the "no air bag" claim is preempted by federal law.

In their complaint for wrongful death, real parties allege that the 1982 Datsun Stanza automobile, driven by their husband/father, was defective in that it failed to have an automatic air bag and that the three-point restraint system was defective. Petitioners moved for summary adjudication of the issue that the "no air bag" claim is preempted by the federal government. The Federal Motor Vehicle Safety Standard 208 established requirements for the occupant restraint system in the 1982 automobile involved in the underlying action; it required

the 3-point safety belt system Nissan installed or an air bag; it has never required air bags. The National Traffic and Motor Vehicle Safety Act section 1392, subdivision (d), requires all state vehicle safety standards to be identical to federal vehicle safety standards; a state common law requirement for air bags would be contrary to the federal requirements and, therefore, preempted.

Federal law provides that compliance with any federal motor vehicle safety standard does not exempt any person from common law liability (15 U.S. C. § 1397, subd. (c)) and does not expressly exempt non-identical state motor vehicle safety standards. However, in *Wood* v. *General Motors Corp.* (1988) 865 F.2d 395, 401, the First Circuit Court of Appeals determined that, while there was no express preemption, a state tort claim for failure to install passive restraints is impliedly preempted.

THEREFORE,

Let a peremptory writ of mandate issue, commanding respondent court to vacate its January 23, 1989 order, denying summary adjudication of the issue that the "no air bag" claim is preempted by federal law entered in Los Angeles Superior Court case No. WEC 103437, and enter a new and different order granting same.

CERTIFIED FOR PUBLICATION
COURT OF APPEAL — SECOND DIST.
FILED
MAY 26, 1989
ROBERT N. WILSON....Clerk

.....
Deputy Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

NISSAN MOTOR CORPORATION IN U.S.A., et al.,
*Petitioners,*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
*Respondent,*

PAULA MEIER, etc., et al.,
*Real Parties in Interest.*

B040894
(L.A.S.C. No. WEC 103437)
(LAWRENCE WADDINGTON, Judge)

**ORDER MODIFYING OPINION AND ORDER GRANTING PEREMPTORY WRIT OF MANDATE; CERTIFICATION FOR PUBLICATION**

The Court:*

It is ordered that the opinion and order granting peremptory writ of mandate filed herein on May 26, 1989, be modified in the following particular:

On page 2, line 7 of second paragraph, place a comma after the words "Vehicle Safety Standard 208" and insert the following:

revised by the Department of Transportation in 1972 to include passive restraints,

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*SPENCER, P.J. HANSON (Thaxton), J. ORTEGA, J.

On page 3, line 6, paragraph ending after the word "preempted," add the following three paragraphs:

One California case has permitted a California action to allege a common law action despite the manufacturer's compliance with federal standards. In *Buccery* v. *General Motors Corp.* (1976) 60 Cal.App.3d 533, 540-541, the court determined that federal regulations are supplementary to the common law of products liability and a defendant's compliance with federal safety standards does not preclude imposition of common law liability for a defective product.

This court is not bound by decisions of other California Courts of Appeal. This court also is not bound by the interpretation of federal law by federal courts lower than the United States Supreme Court (*People* v. *Bradley* (1969) 1 Cal.3d 80, 86; *People* v. *Rooney* (1985) 175 Cal.App.3d 634, 644), and decisions of federal courts on federal issues are merely persuasive. (*Graham* v. *Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 830; *Rohr Aircraft Corp.* v. *County of San Diego* (1959) 51 Cal.2d 759, 764.) However,

we are persuaded that the "no air bag" issue is preempted by federal law.

To hold otherwise would be to allow a potential flood of actions against manufacturers that have been following the custom of the industry and acting in compliance with federal regulations. The result would not work a hardship to manufacturers, but also might so encourage litigation as to hamper the administration of justice. (See *Newman* v. *Emerson Radio Corp.* (May 25, 1989, S009325) ___ Cal.3d ___; *Peterson* v. *Superior Court* (1982) 31 Cal.3d 147, 152-153; *Mark* v. *Pacific Gas and Electric Co.* (1972) 7 Cal.3d 170, 177-178.)

This modification does not effect any change in the judgment.

The opinion and order in the above entitled matter, filed May 26, 1989, and was not certified for publication in the Official Reports. For good cause, it now appears that the opinion and order should be published in the Official Reports, and it is so ordered.

## ORDER DENYING REVIEW

## AFTER JUDGMENT BY THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION ONE,
No. B040894
S010947

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

## IN BANK

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NISSAN MOTOR CORPORATION U.S.A. Et Al.,
*Petitioners*

v.

LOS ANGELES COUNTY SUPERIOR COURT,
*Respondent*

PAULA MEIER
*Real Party In Interest*

---

Real Parties In Interest's petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

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Chief Justice

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.2 *Passenger cars manufactured from September 1, 1973, to August 31, 1983.* Each passenger car manufactured from September 1, 1973, to August 31, 1982, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, S4.1.2.3. Each passenger car manufactured from September 1, 1982, to August 31, 1983, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3, except that a passenger car with a wheelbase of more than 100 inches shall meet the requirements specified in S4.1.3. A protection system that meets requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option — Complete passive protection system.* The vehicle shall:

(a) At each front designated seating position meet the front crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.2; and

(c) Either: (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2

seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second Option — head-on passive protection system.* The vehicle shall —

(a) At each designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option — lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall —

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device re-

strained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

**Amended**

## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 13, 1989, I served the within Petition for a Writ of Certiorari in re: "Paula Meier, et al. v. Nissan Motor Corporation in U.S.A., et al." in the United States Supreme Court, October Term 1989 No. . . ., on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Haight, Brown & Bonesteel
Elliott D. Olson
Roy G. Weatherup
Thomas N. Charchut
201 Santa Monica Boulevard
Post Office Box 680
Santa Monica, CA 90406

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 1989, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA